

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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HERBERT S. PENROSE,

Plaintiff,

v.

SCOTT FRITSCH,

Defendant.

Case No. 3:14-cv-00278-MMD-WGC

ORDER

(Motion to Dismiss - dkt. no. 5; Motion for Preliminary Injunction - dkt. no. 12; Motion to Expunge Lis Pendens - dkt. no. 15)

I. SUMMARY

Before the Court are the following motions: (1) Defendant Scott Fritsch's ("Defendant") Motion to Dismiss (dkt. no. 5); (2) Plaintiff Herbert S. Penrose's ("Plaintiff") Motion for Permanent Injunction (dkt. no. 12); and (3) Defendant's Motion to Expunge Lis Pendens (dkt. no. 15). For the reasons set out below, the Motion to Dismiss is granted, the Motion for Permanent Injunction is denied, and the Motion to Expunge Lis Pendens is granted.

II. BACKGROUND

On May 29, 2014, Plaintiff initiated this action by filing a Motion for Judicial Review ("Motion"). (Dkt. no. 1.) Plaintiff's Motion arises from litigation he filed in the Second Judicial District Court of the State of Nevada, in and for the County of Washoe ("State Court") over a parcel of real property ("the Property"). (Dkt. no. 1 at 1-2.) That case concluded two years earlier when, on May 29, 2012, the State Court entered an Order of Judicial Foreclosure ("Order") that "foreclosed and extinguished in its entirety"

1 Plaintiff's interest in the Property. (Exh. 1, dkt. no. 1 at 11-13.) Plaintiff did not appeal the
2 State Court judgment to the Nevada Supreme Court. (Dkt. no. 5 at 3.)

3 Defendant moves to dismiss the Motion under Federal Rule of Civil Procedure
4 12(b)(1), arguing that Plaintiff has not properly pled a basis for subject matter jurisdiction
5 and that the *Rooker-Feldman* doctrine deprives the Court of subject matter jurisdiction.
6 The Court notes that Plaintiff failed to respond to the jurisdictional issues raised by
7 Defendant in the Motion to Dismiss.¹ While the Motion to Dismiss was pending, Plaintiff
8 filed a Motion for a Permanent Injunction (dkt. no. 12) and a Notice of Lis Pendens (dkt.
9 no. 13). Defendant filed a timely response in opposition to the Motion for a Permanent
10 Injunction (dkt. no. 14) and filed a Motion to Expunge Lis Pendens (dkt. no. 15).

11 **III. DISCUSSION**

12 Defendant's Motion to Dismiss raises threshold issues of subject matter
13 jurisdiction. As resolution of these issues will have an effect on the pendency of the
14 litigation, the Court will address Defendant's Motion to Dismiss first.

15 **A. Rule 12(b)(1) Legal Standard**

16 Rule 12(b)(1) of the Federal Rules of Civil Procedure allows a defendant to seek
17 dismissal of a claim or action for lack of subject matter jurisdiction. Dismissal under Rule
18 12(b)(1) is appropriate if the complaint, considered in its entirety, fails to allege facts on
19 its face that are sufficient to establish subject matter jurisdiction. *In re Dynamic Random*
20 *Access Memory (DRAM) Antitrust Litig.*, 546 F.3d 981, 984-85 (9th Cir. 2008). Although
21 the defendant is the moving party in a motion to dismiss brought under Rule 12(b)(1), the
22 plaintiff is the party invoking the court's jurisdiction. As a result, the plaintiff bears the
23 burden of proving that the case is properly in federal court. See *In re Ford Motor*
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27 ¹After the Court granted Plaintiff a 30-day extension to respond to the Motion to
28 Dismiss (dkt. no. 10), Plaintiff filed a response and an amended response to Defendant's
opposition to his request for extension (dkt. nos. 11 & 16). Neither of these documents
responds to the jurisdictional issues raised by Defendant in the Motion to Dismiss.

1 *Co./Citibank (S.D.), N.A.*, 264 F.3d 952, 957 (9th Cir. 2001) (*citing McNutt v. Gen.*
2 *Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936)).

3 Pursuant to Rule 12(b)(1), a defendant may assert that the *Rooker-Feldman*
4 doctrine deprives a federal district court of subject matter jurisdiction. See, e.g., *Reusser*
5 *v. Wachovia Bank, N.A.*, 525 F.3d 855, 858 (9th Cir. 2008); *Bianchi v. Rylaarsdam*, 334
6 F.3d 895, 898 (9th Cir. 2003). State court litigants may only achieve federal review of
7 state court judgments by filing a petition for a writ of certiorari in the Supreme Court of
8 the United States. *Feldman*, 460 U.S. at 482.

9 1. Sufficiency of Pleading

10 Federal courts are courts of limited jurisdiction. *Owen Equip. & Erection Co. v.*
11 *Kroger*, 437 U.S. 365, 374 (1978). Original jurisdiction must be based either on diversity
12 of citizenship under 28 U.S.C. §1332, or on a claim involving the Constitution, laws, or
13 treaties of the United States pursuant to 28 U.S.C. §1331. Every pleading filed in federal
14 court must contain “a short and plain statement of the grounds for the court’s
15 jurisdiction....” Fed.R.Civ.P. 8(a)(1); see also LR 8-1. Allegations of a *pro se* complainant
16 are held to less stringent standards than formal pleadings drafted by lawyers. *Haines v.*
17 *Kerner*, 404 U.S. 519, 520 (1972).

18 Plaintiff’s Motion, even when viewed under a less stringent standard, does not
19 comply with the pleading requirements of Rule 8(a)(1). The pleading does not contain
20 any statement or factual support to establish a basis for the Court to exercise subject
21 matter jurisdiction over the claim.² Thus, pursuant to Rule 12(b)(1), Plaintiff has failed to
22 meet his burden of proving the claim is properly in federal court. Although the Court
23 recognizes that this action would normally be dismissed without prejudice to give Plaintiff
24 an opportunity to correct the pleading, the Court dismissed with prejudice because, as
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27 ²Plaintiff’s Exhibit 4 is of a document printed from the Internet explaining “diversity
28 of citizenship.” (Dkt. no. 1 at 85-86). However, this document is insufficient for Plaintiff to
establish federal jurisdiction over *his* claim.

1 fully discussed below, the Court is otherwise deprived of subject matter jurisdiction over
2 Plaintiff's claim.

3 **2. The *Rooker-Feldman* Doctrine**

4 The *Rooker-Feldman* doctrine states that federal district courts may not exercise
5 subject matter jurisdiction over a de facto appeal from a state court judgment. See
6 *Rooker v. Fid. Trust Co.*, 263 U.S. 413, 414–17 (1923); *D.C. Ct. of Appeals, et al. v.*
7 *Feldman*, 460 U.S. 462, 482 (1983). The doctrine applies when a federal plaintiff
8 “asserts as a legal wrong an allegedly erroneous decision by a state court, and seeks
9 relief from the state court judgment based on that decision....” *Noel v. Hall*, 341 F.3d
10 1148, 1164 (9th Cir. 2003). As part of a refusal to hear a forbidden de facto appeal, a
11 federal district court “must also refuse to decide any issue raised in the suit that is
12 ‘inextricably intertwined’ with an issue resolved by the state court in its judicial decision.”
13 *Doe v. Mann*, 415 F.3d 1038, 1042 (9th Cir. 2005) (*quoting Noel v. Hall*, 341 F.3d 1148,
14 1158 (9th Cir. 2003)). To determine if an action operates as a de facto appeal, the court
15 “pay[s] close attention to the *relief* sought by the federal-court plaintiff.” *Cooper v.*
16 *Ramos*, 704 F.3d 772, 777-78 (9th Cir. 2012) (*quoting Bianchi v. Rylaarsdam*, 334 F.3d
17 895, 990 (9th Cir. 2003)).

18 Here, to the extent Plaintiff seeks “judicial review,” the Court construes the claim
19 as a direct challenge to the correctness of the State Court’s decision and a request to
20 set the Order aside.³ As construed, the Court concludes that Plaintiff’s claim constitutes
21 a forbidden de facto appeal of the State Court Order. See *Noel*, 341 F.3d at 1163
22 (explaining that a de facto appeal occurs when a plaintiff complains of a “legal injury

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24 ³Plaintiff’s Motion is silent as to the exact relief sought beyond “judicial review.”
25 (Dkt. no. 1 at 1-2.) However, Plaintiff’s Exhibit 1 is the Order in which Plaintiff highlighted
26 and edited those portions he asserts contain legal and factual errors, indicating to the
27 Court that he is challenging the Order itself. (Dkt. no. 1 at 5-9.) Additionally, Plaintiff’s
28 Exhibit 3 is the transcript of the nonjury trial with numerous handwritten marks and notes
presumably made by Plaintiff to point out errors in the proceeding. (Dkt. no. 1 at 16-83.)

The Court also notes that Plaintiff had thirty (30) days to file a notice of appeal to
the Nevada Supreme Court after the entry of final judgment, but Plaintiff failed to do so.
See Nev.R.App.P. 4 (2013).

1 caused by a state court judgment, based on an allegedly erroneous legal ruling, in a
2 case in which the federal plaintiff was one of the litigants"). To provide Plaintiff with the
3 relief he seeks would require this Court to analyze the State Court's alleged legal errors
4 and void the Order, which is equivalent to an appellate review falling squarely within the
5 confines of *Rooker-Feldman*. Moreover, the Court may not review any issues
6 "inextricably intertwined" with an issue addressed by the State Court. See *Doe*, 415 F.3d
7 at 1042-43 (requesting that a federal district court undo a judgment based on an issue
8 resolved by the state court constitutes a de facto appeal). As such, the *Rooker-Feldman*
9 doctrine deprives the Court of subject matter jurisdiction over Plaintiff's claim and the
10 Court accordingly dismisses Plaintiff's Motion with prejudice.

11 **IV. CONCLUSION**

12 It is hereby ordered that Defendant's Motion to Dismiss (dkt. no. 5) is granted.
13 Plaintiff's Motion for Judicial Review (dkt. no. 1) is dismissed with prejudice.

14 It is further ordered that Plaintiff's Motion for a Permanent Injunction (dkt. no. 12)
15 is denied as moot.

16 It is further ordered that Defendant's Motion to Expunge Lis Pendens (dkt. no. 15)
17 is granted.

18 The Clerk of Court is hereby ordered to close this case.

19 DATED THIS 10th day of OCTOBER 2014.

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22 MIRANDA M. DU
23 UNITED STATES DISTRICT JUDGE
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